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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOWARD and EVE REISS,

Petitioners,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, THIRD DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the permanent physical invasion of property by the electromagnetic field emitted from a massive high voltage regional electric power transmission line constitute a taking of property without payment of just compensation under the Fifth Amendment to the United States Constitution where:

1. the property owner is powerless to prevent the electromagnetic field invasion or exclude the electromagnetic field from the property;

2. the permanent physical invasion of the property by the electromagnetic field destroys approximately one third of the value of the property because potential purchasers are scared that the electromagnetic field invading the property will cause cancer, particularly in children;

3. the property physically invaded by the powerline electromagnetic field is one of a discrete and limited number of properties which are substantially devalued because they immediately abut a massive high voltage electric power transmission line; and

4. the vast number of properties which are either in the general vicinity of, but do not immediately abut, such massive high voltage electric power transmission lines, or abut ubiquitous local lower voltage electric lines, are not subject to any measurable electromagnetic field invasion and have not suffered any loss in value?

The New York State Supreme Court Appellate Division, Third Department, held that an electromagnetic field is not capable of causing a physical invasion of property, as a matter of law, because an electromagnetic field cannot be

perceived by human beings' five senses. The Appellate Division also held that there was no taking because there is no scientific proof that an electromagnetic field constitutes a health hazard and renders property unsafe and uninhabitable. Accordingly, the Appellate Division held that no taking had occurred and answered the Question Presented in the negative.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, THIRD DEPARTMENT

Petitioners Howard and Eve Reiss ("Reisses") request that a writ of certiorari issue to review the Opinion and Order of the Appellate Division, Third Department of the Supreme Court of the State of New York dated December 5, 1996 which affirmed the Order of the Supreme Court of Westchester County dated June 14, 1995 which granted summary judgment to Consolidated Edison Company of New York, Inc. ("Con Ed") dismissing the Reisses' complaint.

OPINIONS BELOW

The opinion of the New York Supreme Court Appellate Division, Third Department is reported at 228 App. Div.2d 59, 650 N.Y.S.2d 480 (3d Dept. 1996). It is also reproduced in Appendix A at A-1 - A4. The decision of the District Court is unreported and is reproduced in Appendix B at B-1 - B-2.

JURISDICTION

The Opinion and Order of the New York Supreme Court Appellate Division, Third Department (the "Opinion") was entered on December 5, 1996 and notice of entry thereof was served by Con Ed on December 13, 1996. Notice of Appeal as-of-right to the New York Court of Appeals was timely served on January 10, 1997 and timely filed in the Office of the Westchester County Clerk on January 15, 1997. The Court of Appeals dismissed the as-of-right appeal in an Order entered on May 8, 1997 and notice of entry thereof was served by Con Ed on May 14, 1997. A Motion for Leave to Appeal to the Court of Appeals was timely served on May 29, 1997. The Motion for Leave to Appeal was denied in an Order entered in the Office of the Clerk of the Court of Appeals on September 16, 1997 and

notice of entry thereof was served by Con Ed on September 25, 1997. The Order of the Court of Appeals denying the Motion for Leave to Appeal is reproduced in Appendix C at C-1. By reason of the actions of the Court of Appeals, the Opinion and Order of the New York State Supreme Court Appellate Division, Third Department, is the final judgment or decree rendered by the highest court of the State of New York in which a decision could be had. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Relevant Facts

In 1984, the Reisses purchased and substantially improved a single family home in the Village of Pleasantville, Westchester County, New York (the "Property"). The Property abuts a Con Ed right-of-way on which was constructed a 345 kilovolt high voltage electric transmission powerline (the "Powerline"). The Powerline is *not* one of the ubiquitous local electric lines found in communities throughout the United States, but is a massive regional transmission line hung on huge steel towers which transmits electricity from upstate New York to the New York City Metropolitan area.

The Powerline emits an electromagnetic field ("EMF") which physically invades the Property. It is undisputed that EMFs from the Powerline invaded and

continue to invade the Property. Although the EMFs are not perceptible via the five senses, their presence was detected on the Property using the commonly accepted device for measuring the presence of EMFs — a gaussmeter.[1] Con Ed has never denied that EMFs from its high voltage powerline invade the Property.

The Reisses are physically unable to prevent the invasion of their Property by the EMFs generated from and emitted by the Powerline. The EMFs from the Powerline diminish rapidly with distance from the Powerline. Thus, only properties which immediately abut the Powerline are physically invaded by the Powerline EMF. The Property is one of a discrete and limited number of properties which immediately abut the Powerline.

In 1993, after becoming aware of the concerns that EMFs from such high voltage electric transmission powerlines can cause cancer, particularly in children, the Reisses feared that the EMFs invading their Property from the Powerline could be injurious to their child. Thus, the Reisses listed the Property for sale with a local broker for $325,000.

After eighteen months of showings to 139 prospective purchasers, after multiple price reductions, after one offer which was subsequently withdrawn due to health fears associated with cancer from the powerline, the Reisses

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Using such a measuring device is hardly novel. Many agents are not perceptible to the five senses, but are identified through various meters, such as detecting radiation using a geiger counter or contaminants in groundwater using a gas chromatograph in a laboratory.

ultimately sold the Property for $230,000. That price is more than $100,000 less than the sale price of comparable properties not adjacent to high voltage powerlines — literally, properties across the street and around the corner -- but not invaded by EMFs from Con Ed's Powerline.

The Proceedings Below

The Reisses commenced this action alleging causes of action for inverse condemnation and trespass. Regarding the inverse condemnation claim, the Reisses alleged that the physical invasion of their Property by the EMFs substantially interfered with their right to exclude others from the Property and their right to dispose of their Property, all in violation of the United States and New York State Constitutions.

Following joinder of issue, Con Ed moved for summary judgment. The Westchester County Supreme Court granted Con Ed summary judgment. The Reisses appealed to the New York State Supreme Court Appellate Division, Second Department. The Second Department transferred the appeal to the Third Department which heard the appeal. The Third Department affirmed the trial court.

The Reisses appealed to the New York Court of Appeals, asserting an as-of-right appeal. The Court of Appeals dismissed the Reisses as-of-right appeal. Accordingly, the Reisses moved for leave to appeal to the Court of Appeals. The motion for leave to appeal was denied. As a result, the Decision and Order of the Appellate Division, Third Department is the final judgment or decree of the highest court of the State of New York in which a decision could be had.

REASONS FOR GRANTING THE WRIT

I.

IN AN UNPRECEDENTED HOLDING, THE APPELLATE DIVISION RULED THAT A TAKING OF PROPERTY CAN NEVER ARISE FROM A PHYSICAL INVASION WHICH IS IMPERCEPTIBLE TO ONE OF THE FIVE SENSES

The Appellate Division established an unprecedented bright line rule that a physical invasion cannot cause an inverse condemnation under the United States Constitution if the agent which invades the property is not perceptible by one of the five senses:

> The uncontroverted evidence reveals that the EMFs at issue here are incapable of being perceived by the senses and, thus, are not capable of resulting in a "physical" invasion. Accordingly, there is no evidence that defendant has "taken" or damaged plaintiffs' property.

Opinion at A-3.

No citation supports the Appellate Division's purported statement of the law. Moreover, no reason is given why an agent must be perceptible to one of the five senses in order to produce a "physical" invasion which can give rise to a taking. It is beyond doubt, that property can be invaded by many agents which are incapable of being perceived by the five senses of sight, hearing, taste, touch or smell. Examples include radiation (x-rays, radon, and ultraviolet light), many air and groundwater pollutants, bacteria, viruses, and, as is

relevant to this case, EMFs. Under the Appellate Division's new rule of law, none of these agents could ever physically invade property and, therefore, could not cause a taking of property.

There is no dispute in this litigation that EMFs are real, that they are generated by the Powerline, that they radiate outward from the Powerline, that they leave Con Ed's right-of-way and that the electromagnetic field from the Powerline is physically present on the Property. Thus, there is no doubt that the EMF's from the Powerline have invaded the Property. The Appellate Division apparently considers this invasion "non-physical" solely because EMFs cannot be perceived by human beings without the aid of a gaussmeter. This distinction makes no sense.

An invasion by an x-ray is "physical" even though a human being cannot perceive subatomic particles moving through space, crossing a property line and bombarding the property or person on the other side. Similarly, bacteria or viruses cannot be perceived, but no one would doubt that they are physical things which can move and therefore be present on or invade property. Sound, whether or not within the range of human hearing is a wave or force which can move through space and invade property. Light, whether within the range or human vision or at the non-visible ultraviolet or infrared ranges of the spectrum has some attributes of a wave or force and some attributes of a stream of particles (photons) which, in either case move through space and invade property.

The same is true of an electromagnetic field. An electromagnetic field is real. It can be measured and the presence of a strong EMF surrounding very high voltage power lines is well known and not disputed by Con Ed. It is also undisputed that EMF's are not static. When generated by

a source, such as the Powerline, they radiate outward. In essence, the electromagnetic field moves through space from the Powerline and invades other property. Its invasion of the Property is physical because its actual presence can and has been detected on the Property using the device for measuring EMF radiation — a gaussmeter.

While takings were originally recognized only in the extreme circumstance of a permanent occupation which physically ousted the owner from possession,[2] such an extreme invasion has been recognized as a taking for so long that it is now deemed to be a per se taking and requires just compensation even if the resulting damages are insignificant. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.* ("*Loretto*"), 458 U.S. 419, 438, 102 S. Ct. 3164, 3177-78 (1982) (small cable TV box attached to the outside of a building).

However, as our society became technologically and commercially more complex, and our laws and regulations have multiplied, the courts expanded the types of physical

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2 *See* Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1184 (1967) ("Michelman"). As Professor Michelman noted: "At one time it was commonly held that, in the absence of explicit expropriation, a compensable taking could occur only through physical encroachment and occupation." (cited in *Loretto*, 458 U.S. at 428, 102 S.Ct. at 3172, n. 5) (emphasis in original.) Yet, by 1967 physical encroachment and occupation no longer defined the only situation where just compensation would be due -- under certain circumstances, "nontrespassory injuries" too could require compensation: "The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover." Michelman at 1184 (emphasis added).

invasions which can cause a taking.[3] Thus, the Appellate Division's bright line rule is a giant step backward. For no apparent reason, the Appellate Division focuses on whether the physical invasion can be perceived by the human senses, instead of whether the physical invasion is real and can be ascertained.

In this case, because there is no dispute that the EMFs invade the Property, there mere fact that they cannot be perceived by the five human senses should not preclude the Reisses taking claim, as a matter of law. Rather, as discussed in the next point, the taking claim is cognizable if the physical invasion causes a substantial interference with the Reisses property rights.

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See Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 157-58, 440 N.Y.S.2d 843, 860-61 (1981) (Chief Judge Cooke, dissenting), rev'd, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171 n. 5 (1982); Michelman, *id.* (cited in *Loretto*, 458 U.S. at 428 n. 5, 102 S.Ct. at 3171 n. 5; 2 J. Sackman, *Nichols' Law of Eminent Domain*, §24.02[1] at 24-5 (rev. 3d Ed. 1980). Nichols' definitive treatise recognizes "three identifiable growth periods" in the scope of cognizable takings in particular; the first coinciding with the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922), and the second coinciding with *United States v. Causby* ("*Causby*"), 328 U.S. 256, 66 S.Ct. 1062 (1946). The third concerned regulatory takings, not relevant here.

II.

THE APPELLATE DIVISION DISREGARDED THIS COURT'S PRECEDENT IN HOLDING THAT A PROPERTY OWNER MUST PROVE THAT PROPERTY IS UNSAFE AND UNINHABITABLE TO ESTABLISH AN INVERSE CONDEMNATION

After reemphasizing its requirement that a physical invasion must be "perceptible by the senses and, as such... offensive and harmful"[4] in order to establish a physical invasion, the Appellate Division then held that such evidence of harm had to render the property unsafe and uninhabitable:

> [P]laintiffs have failed to prove harm by reason of the existence of EMFs. Specifically, they have offered no scientific proof that EMFs constitute a health hazard, thereby rendering their property unsafe and uninhabitable. Having failed to establish that defendant harmed plaintiffs' property, plaintiffs are not entitled to reimbursement for the diminution in value of their property.

Opinion at A-3 - 4.

The Appellate Division cites no authority in support of its draconian rule that no taking occurs unless: (1) a physical invasion is perceptible to the five senses, and (2) the property owner proves that such a perceptible invasion causes a health hazard which makes the property unsafe and uninhabitable. Such a rule is a severe truncation of the rights long guaranteed to property owners under the United States

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[4] Opinion at A-3.

Constitution.

As discussed more fully, *infra*, this Court's jurisprudence allows a property owner to demonstrate a taking arising from a physical invasion if that invasion causes a substantial interference with one or more of the owner's "essential sticks in the bundle of rights that are commonly characterized as property...." *Kaiser Aetna v. United States* ("*Kaiser*"), 444 U.S. 164, 176, 100 S.Ct. 383, 391 (1979). *See also Seawall Associates v. City of New York* ("*Seawall*"), 74 N.Y.2d 92, 102, 544 N.Y.S.2d 542, 546, *cert. denied*, 493 U.S. 976 (1989).

As is predictable, the vast majority of cases in which an inverse condemnation is alleged to arise from a physical invasion arise where the direct use and enjoyment of property is damaged or destroyed. *See, e.g., Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531(1962) (use and enjoyment of property alleged to have been damaged due to noise and lights from airplane flights); *Causby*, *supra* (noise and lights from flights alleged to interfere with use of property); and *Tom Sawyer Motor Inns, Inc. v. County of Chemung*, 39 A.D.2d 4, 331 N.Y.S.2d 154 (3d Dept. 1972), *aff'd*, 32 N.Y.2d 775, 344 N.Y.S.2d 958 (1973) (use and enjoyment alleged to have been damaged due to odors from a sewage treatment plant).

However, an allegation that a physical invasion directly causes an interference with the use and enjoyment of property may be the most common basis for alleging a substantial interference with a property owner's bundle of rights, no case is cited by either the Appellate Division or Con Ed that such an allegation is the *only* way of proving a taking or the *sine qua non* for a taking. Indeed, the Reisses could not find a case which precludes a property owner from

establishing a taking by showing that other "sticks" in the bundle of rights are substantially interfered with as a result of a physical invasion.

One of these essential "sticks" is the right to dispose of one's property. See *Loretto*, 458 U.S. at 435, 102 S.Ct. at 3177 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'") (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359 (1945); *Skip Kirchdorfer, Inc. v. U.S.*, 6 F.3d 1573, 1579 (Fed. Cir. 1993); *Seawall*, 74 N.Y.2d at 103, 544 N.Y.S.2d at 546.

Another "of the most essential sticks in the bundle" is "the right to exclude others." Kaiser, 444 U.S. at 176, 100 S.Ct. at 391.

Moreover, in showing substantial interference with such a property right, a physical invasion need not render the property uninhabitable, unusable or unmarketable to cause a taking. See *Loretto*, 458 U.S. at 435, 102 S.Ct. at 3177; *Causby*, 328 U.S. at 266, 66 S.Ct. at 1068. However, in order to rise to the level of a taking, the interference with one or more of these sticks by the physical invasion must be "substantial." *Id.* The substantiality of the interference is demonstrated by the extent to which the interference causes a reduction in value, which, of course, is the ultimate measure of a property owner's damages. *See Richards v. Washington Terminal Co.* ("*Richards*"), 233 U.S. 546, 549-50, 34 S.Ct. 654, 655 (1914) (30% devaluation due to gases and smoke constitutes a taking). *See also Cunliffe v. County of Monroe*, 63 Misc. 2d 62, 312 N.Y.S.2d 879, 883 (Sup. Ct. Monroe Cty. 1970) ("[I]f a claimant can demonstrate that the value of his property is substantially diminished by reason of the acts complained of, he will have met his burden of proof regarding

the cause of action for an unconstitutional taking.").

Thus, the Reisses contend that the Constitution of the United States enables a property owner to establish a taking by showing a physical invasion of property (whether or not perceptible to the five senses) which substantially interferes with any one of the essential sticks in the bundle of property rights inherent to ownership. In this case, the Reisses contend that the rights substantially interfered with by the EMF invasion from Con Ed's Powerline are the rights to exclude others and to dispose of one's property.

There is no disagreement that the Reisses could not exclude the EMFs from their Property and that the EMFs would continue to invade their property against the Reisses' will. An invasion of property by a foreign agent against the owner's will is a substantial interference with the right to exclude others. In addition, there is no disagreement that the EMFs invading the property substantially interfered with the Reisses' right to dispose of their property. The EMF invasion scared off 139 prospective purchasers and drove down the fair market value of the Property by approximately a third.

Although the Appellate Division accepts these facts, it concludes that the EMF invasion cannot be a taking because the destruction of the Reisses' property rights had to be accompanied by an interference with use and enjoyment — holding, in essence, that a substantial interference with the right to exclude others or the right to dispose cannot *alone* be the predicate for a taking arising from a physical invasion.

The Appellate Division's misconstruction and radical evisceration of the law of takings under the United States Constitution is all the more puzzling because the Appellate Division failed to discuss, much less distinguish, the leading

case from this Court. In *Portsmouth Harbor Land & Hotel Co. v. United States* ("*Portsmouth*"), 260 U.S. 327, 43 S. Ct. 135 (1922), Justice Holmes wrote an opinion in which this Court concluded that the *fear* of the consequences arising from a government invasion constituted a taking.

In *Portsmouth*, the ongoing firing of guns across -- but not onto -- property was held to be an invasion which constituted a taking. The United States established a coastal battery adjacent to plaintiff's resort and occasionally fired artillery across the resort property. As a result, "the public [was] frightened off the premises" inflicting "serious loss." 260 U.S. at 328-29, 43 S.Ct. at 136. The Supreme Court remanded to the Court of Claims, holding that, if an intent on the part of the United States to continue its intermittent firing could be established, the evidence would support a finding that a compensable taking had occurred. 260 U.S. at 329, 42 S.Ct. at 136-37.

In *Portsmouth*, there was no finding that the presence and extremely rare firing of artillery across a resort actually produced any *physical* impairment of the use or enjoyment of the property. Indeed, the government merely *tested* the guns by firing two of them in June, 1902 and another one in September, 1902. The shells flew over the resort at that time. The guns were *never* fired for the next nine years, although the government claimed it had reserved the right to do so. 260 U.S. at 333, 43 S. Ct. at 138. The guns were removed and shipped to France during WWI. The battery was reinstalled and discharged once for testing in December, 1920. Id., 260 U.S. at 329, 43 S. Ct. at 136-137. The critical impairment of rights resulted solely from the *fear* that the government invasion engendered in the resort's customers. Id., 260 U.S. at 329, 43 S. Ct. at 136 ("there is no doubt that a serious loss has been inflicted upon the

claimant, as the public has been frightened off the premises by the imminence of the guns...").

In *Portsmouth*, there was no proof — or, indeed, any discussion of any requirement that the property owner had to prove — that scientific evidence established a true and actual danger arising from the potential discharge. Indeed, all that the property owner had to prove was that the United States reserved the *right* to invade in the future. That was enough to trigger a taking because the property owner suffered a serious diminution in value arising from the physical invasion of his property by the United States. In essence, *Portsmouth* teaches that the loss of value arising from a physical invasion need not be the result of a scientifically validated danger to give rise to a taking. It is enough that the physical invasion substantially interferes with *any* of the essential sticks in the bundle of rights causing a diminution in value of the property. That the diminution in value comes from people being irrationally or rationally "scared off" the property, does not preclude an award of just compensation. *Portsmouth*; *Criscuola v. Power Authority* ("*Criscuola*"), 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993).

Similarly, in the present case, the Property was physically invaded by EMFs, causing cancerphobia in the market and a substantial interference with the Reisses' right to dispose of their property. In essence, Con Ed (the government's surrogate) is radiating EMFs (instead of shells) across plaintiffs' property and, indeed, onto and into their home. As in *Portsmouth*, both the Reisses and the market generally (house hunters in Pleasantville) have been "frightened off the property."

By requiring a property owner to establish that the right to use and enjoy property must be the bundle in the stick of property rights which is destroyed in order to establish a taking arising from a physical invasion, the Appellate Division effectively disregards and overrules *Portsmouth* and its progeny. To prevent the elimination of property rights long guaranteed under the United States Constitution, this Court should grant the petition for writ of certiorari.

III.

THE EMF INVASION OF THE PROPERTY IMPOSES A DISPROPORTIONATE BURDEN WHICH IN JUSTICE AND FAIRNESS SHOULD BE SPREAD AMONG AND BE BORNE BY THE GENERAL PUBLIC

The Court's inquiry in this case is appropriately guided by the fundamental purpose of the Takings Clause: "'[T]o bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123, 98 S. Ct. 2646, 2659 (1978) (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960); *see also Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 2316 (1994); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4; 107 S.Ct. 3141, 3148 n.4 (1987)

Thus, a pivotal question in determining whether a particular type of physical invasion should be recognized as a taking is whether the interference complained of affects a discrete number of property owners, or whether its impact is spread throughout society. As the affected number becomes smaller, and the economic impact more concentrated and

severe, a finding that a taking has occurred becomes more certain. As the affected number of property owners grows, the more the burden on society has already been shared and, therefore, there is no taking.

The cases concerning the development of our modern transportation infrastructure are illustrative. The growth of modern ground transportation, first the steam locomotive and later the automobile, brought great societal benefits, but also inconveniences. *See Richards*, 233 U.S. at 554-55, 34 S.Ct. at 657. Some of those inconveniences were sufficiently widespread, and their adverse economic impact on those affected sufficiently mild, that the courts let the burdens lay where they fell.

However, when a discrete group of severely impacted property owners are singled out to bear a substantial and disproportionate burden -- such as those who own properties near a tunnel portal -- a taking occurs. *See Richards*, *supra*. Thus, where substantial burdens are focused upon a discrete group of severely impacted property owners, fundamental fairness pursuant to the Takings Clause requires payment of just compensation.

As the Court of Appeals recently recognized in *Criscuola*, *supra*, properties that are invaded by EMFs are impacted because the buying public is afraid that if they reside in such a home, they and their children might develop cancer. Cancerphobia is not the annoying hum of highway traffic, or the clang of a train bell. It is a very serious fear which not only motivated the Reisses to sell their property, but cost the Reisses -- entirely innocent homeowners -- $100,000, or 30% of the value of their home.

Millions of rate payers benefit from the power

transmitted across regional high voltage electric power transmission lines. The Reisses belong to the tiny fraction of property owners who are currently forced to bear all of the cost of cancerphobia caused by the EMF invasion from Con Ed's regional high voltage power transmission lines. Spread among millions of rate payers, the payment by any single individual would be insignificant, if it were perceptible at all. When allocated exclusively to the relatively few property owners living next to the high tension powerlines, like the Reisses, the individual impact is devastating.

The fact that this case involves a regional 345 kilovolt high voltage power transmission line and one of the discrete and limited number of immediately adjacent of properties, distinguishes it from cases in which no taking was found arising from EMFs invading property from ubiquitous neighborhood power lines, such as the small 12 kilovolt neighborhood distribution line at issue in *San Diego Gas & Elec. Co. v. Superior Court of Orange County* ("*San Diego Gas*"), 55 Cal. Rptr. 2d 724, 920 P.2d 669 (1996).

When ubiquitous neighborhood electric lines are the issue, their wide distribution causes any injury to be distributed throughout the population generally. No disproportionate burden is placed on a discrete and limited class of persons. That, however, is not remotely similar to the factual setting of this case. Here, Con Ed has two major transmission lines running next to the Reisses' property, each of which has a capacity to carry 345 kV. That is over 50 times the power carried by a 12 kV neighborhood electric line like the one at issue in *San Diego Gas*, *supra*.

Major transmission lines are not ubiquitous. There are only a few of them and there are a discrete number of owners whose property is directly and immediately adjacent to such

major transmission lines and whose property value is uniquely and substantially diminished by the market's cancerphobia response to the invasion of EMFs from those major transmission lines.

In fact, the unrebutted appraisal evidence in this case strikingly demonstrates that comparable properties literally across the street or only a block or so distant from the Powerline were not stigmatized by cancerphobia arising from EMF invasion even though they are serviced by readily visible neighborhood distribution lines. Indeed, the unrebutted appraisal evidence submitted by the Reisses demonstrates that the fair market value of those properties was not adversely impacted by concern about EMFs, unlike properties, like the Reisses', which are *immediately adjacent* to the Powerline and were sold at substantially devalued prices.

Thus, the specter of everyone standing in line to collect from the local power company does not arise from this case or from the rule of law advocated by the Reisses herein. Indeed, the converse is true -- the Reisses and that limited and discrete group of owners immediately adjacent to high voltage transmission lines bear a disproportionate and very heavy burden so that the general public can receive electricity. Under such circumstances the Appellate Division misconstrued the law of takings under the United States Constitution.

CONCLUSION

The Reisses, of course, were not thinking of what their constitutional rights might be when they purchased and substantially rebuilt the Property. They are the entirely innocent victims of the EMF invasion of their Property and

the resulting substantial interference with their ability to exclude the EMFs and dispose of their property.

Without the remedy of inverse condemnation, the Reisses will have no ability to spread the disproportionate and egregious burden of their $100,000 loss with the millions of Con Ed's rate payers who benefit from the electric power delivered through the massive regional high voltage Powerline. The Reisses' only recourse is the "justice and fairness" guaranteed them by the Fifth Amendment of the United States and the wisdom of this Court.

For these reasons, the writ of certiorari should be granted.

Dated: December 15, 1997
New York, New York

Respectfully submitted,

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On the Petition

APPENDIX

APPENDIX A

HOWARD and EVE REISS,
Appellants,
v.
CONSOLIDATED EDISON COMPANY
OF NEW YORK INC.,
Respondent.

Docket No. 95-06596

Calendar Date Oct. 2, 1996

Decided Dec. 5, 1996

Crew III, J.

Appeal (transferred to this court by order of the Appellate Division, Second Department) from an order of the Supreme Court (Donovan, J.), entered June 14, 1995 in Westchester County, which granted defendant's motion for summary judgment dismissing the complaint.

In 1984, plaintiffs purchased a house in the Village of Pleasantville, Westchester County. The property abuts defendant's right-of-way, upon which is constructed a high voltage electric transmission line. Fearing that the electromagnetic fields (hereinafter EMFs) emitted from such line might be injurious to their child's health, plaintiffs decided to sell the property in April 1993 and listed it with a local broker for $325,000. Eighteen months later, after 139 persons had viewed the parcel, with one couple making an offer and later refusing to close due to health fears associated with the power line, the property sold for $230,000. The record reveals that the ultimate sale price obtained by

plaintiffs was 30% less than comparable properties in the Village due to the public perception that the power line posed a health hazard.

Plaintiffs thereafter commenced this action alleging causes of action for trespass and inverse condemnation and seeking a permanent injunction. Following joinder of issue, defendant moved for summary judgment. In their opposition papers, plaintiffs withdrew their request for injunctive relief and, thereafter, Supreme Court granted defendant's motion as to the remaining causes of action.[5]

On this appeal, plaintiffs claim that defendant invaded their property with a non-solid agent for the benefit of the general public causing substantial diminution in the value of their property, thus constituting a de facto taking for which they are entitled to compensation. In order to sustain a cause of action for inverse condemnation, plaintiffs must allege and prove that defendant "has intruded onto the [plaintiffs'] property and interfered with [their] property rights to such a degree that the conduct amounts to a constitutional taking." *(O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158). The *sine qua non* for such a cause of action is that defendant's conduct must constitute a permanent physical occupation of plaintiffs' property amounting to the exercise of dominion and control thereof *(see, e.g., United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206; *O'Brien v. City of Syracuse, supra; City of Buffalo v. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345,

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[5] Inasmuch as plaintiffs have not argued in their brief that the trespass cause of action was erroneously dismissed, they are deemed to have abandoned that issue and we will not address it (*see, Gibeault v Home Ins. Co.*, 221 A.D.2d 826, 827 n.2, 633 N.Y.S.2d 678).

269 N.E.2d 895). In our view, plaintiffs have neither established such occupation nor raised a triable issue of fact in that regard.

In support of its motion for summary judgment, defendant proffered the affidavit of Daniel Mark, a Ph.D. in power engineering [*sic*] employed by defendant as an electrical engineer, who explained that EMFs consist of invisible lines of force produced by electricity, which can neither be seen, heard nor felt except in very limited circumstances not germane here. In opposition to defendant's motion, plaintiff Howard Reiss submitted an affidavit in which he averred that he had obtained a gaussmeter, which indicated the presence of EMFs on his property. Simply stated, such an affidavit was insufficient to create a question of fact as to whether a physical invasion of plaintiffs' property had occurred. The uncontroverted evidence reveals that the EMFs at issue here are incapable of being perceived by the senses and, thus, are not capable of resulting in a "physical" invasion. Accordingly, there is no evidence that defendant has "taken" or damaged plaintiffs' property.

Although plaintiffs contend that the facts of this case are akin to cases involving intangible intrusions, such as noise or odor, where property owners have been compensated *(see, e.g., Griggs v. County of Allegheny,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 585 [property in question adjacent to airport]; *Tom Sawyer Motor Inns v. County of Chemung,* 39 A.D.2d 4, 331 N.Y.S.2d 958, 298 N.E.2d 120 [property at issue adjacent to sewer plant]), we cannot agree. Common to such cases is the notion that the intangible intrusion was perceptible by the senses and, as such, was offensive and harmful. Having established such harm, the property owner then was permitted to prove damages, an element of which is diminution in property value. Here, however, plaintiffs have failed to prove

harm by reason of the existence of EMFs. Specifically, they have offered no scientific proof that EMFs constitute a health hazard, thereby rendering their property unsafe and uninhabitable. Having failed to establish that defendant harmed plaintiffs' property, plaintiffs are not entitled to reimbursement for the diminution in the value of their property.

ORDERED that the order is affirmed, without costs.

MIKOLL, J.P., MERCURE, YESAWICH and PETERS, JJ., concur.

APPENDIX B

HOWARD and EVE REISS,
Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Defendant.

Westchester County Index No. 10243/94

Motion Date Mar. 17, 1995

Dated June 12, 1995

The following papers read on this motion by defendant for dismissal.

	PAPERS NUMBERED
NOTICE OF MOTION and MEMO	1, 2
ANSWERING AFFIDAVITS and MEMO	3, 4
REPLYING AFFIDAVITS and MEMO	5, 6

Upon the foregoing papers it is ordered that this motion is granted and the complaint dismissed with prejudice for failure to state a cause(s) of action.

No actionable taking or trespass is shown. In *Borenkind v. Consolidated Edison Corp.* (Westchester Index #9231/94; N.Y.L.J., April 17, 1995 p.34 c2) this Court in a Decision and Order dated March 28, 1995, analyzed a remarkably similar pattern of factual allegations and in

dismissing same, distinguished the Court of Appeals holding in *Criscuola v. PASNY*, 81 NY2d 649. All of the legal conclusions there are equally applicable here.

ENTER

Dated: June 12, 1995
White Plains, New York

W. Denis Donovan, J.S.C.

APPENDIX C

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the sixteenth day of September 1997

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding:

HOWARD REISS et al.,
Appellants,
v.
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Stuart M. Cohen
Clerk of the Court

Supreme Court, U.S.
FILED
JAN 13 1998
CLERK

No. 97-997

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

HOWARD and EVE REISS, *Petitioners,*

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *Respondent.*

On Petition For A Writ Of Certiorari To The New York State Supreme Court Appellate Division, Third Department

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a "taking" of property requiring compensation under the Fifth Amendment to the United States Constitution result when property adjacent to an electric transmission line right-of-way is devalued due to a public fear that the electric and magnetic fields produced by transmission lines are hazardous, where the uncontested proof establishes that electric and magnetic fields are not detectable by the human senses and where no allegation has been made and no proof has been offered that such fields are actually hazardous?

RULE 29.6 DISCLOSURE

The parent of respondent Consolidated Edison Company of New York, Inc. is Consolidated Edison, Inc.

Respondent Consolidated Edison Company of New York, Inc. owns a minority interest (approximately 25.6%) in Honeoye Storage Corporation. It has no other nonwholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Consolidated Edison Company of New York, Inc. ("Con Edison") respectfully requests that this Court deny the petition for certiorari seeking review of the Opinion and Order, entered December 5, 1996, of the Appellate Division, Third Department, of the Supreme Court of the State of New York.

OPINIONS BELOW

The opinion sought to be reviewed is reported at 228 A.D.2d 59, 650 N.Y.S.2d 480 (3d Dept. 1996).

The summary of decisions below set forth in the Petition (Pet. 6) is incomplete. In addition to the decisions there listed and reproduced in the Appendices to the Petition, the New York Court of Appeals dismissed Petitioners' appeal taken as of right in an order entered May 8, 1997, "upon the ground that no substantial constitutional question is directly involved." That order is reported at 89 N.Y.2d 1085, 659 N.Y.S.2d 858, 681 N.E.2d 1305 (1997), and is reproduced in the Appendix to this Brief in Opposition, at A-1.

JURISDICTION

Petitioners assert that this Court has subject matter jurisdiction under 28 U.S.C. § 1257 (Pet. 2). As more fully discussed in point "I" of this Brief, Respondent disputes Petitioners' assertion of subject matter jurisdiction on the ground that the Opinion and Order sought to be reviewed was decided on an independent and adequate state law ground.

STATEMENT OF THE CASE

In their Complaint, Petitioners alleged, among other things, that public fear of electric and magnetic fields ("EMFs") produced by, and entering their former property from, a nearby Con Edison transmission line stigmatized, devalued, and rendered the property unmarketable, thereby effecting a *de facto* physical "taking" requiring compensation under the New York and United States constitutions (R 42-43)[1]. Petitioners neither alleged nor sought to prove that EMFs are physically harmful or offensive to the human senses or that EMFs physically impair the use or enjoyment of property.

Petitioners purchased the subject property, which abuts the transmission line right-of-way, in 1984 for $ 160,000 (R 185). At that time, Con Edison's transmission line existed in its current form — a 61.4 mile-long line of 100 foot tall lattice steel towers spaced approximately 650 feet apart and carrying two 345 kV circuits (R 23-24). The first transmission line occupying the right-of-way began operation in 1932 (R 24), several years before the house on the subject property was built (R 196). The transmission line was later rebuilt and upgraded, pursuant to approvals of the appropriate public authorities (R 24-25). The portion of the line near the subject property took on its current form in 1974 (R 25), ten years before Petitioners purchased the property.

Electric and magnetic fields consist of invisible lines of force necessarily produced by electricity. These fields are

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[1] Parenthetical numbers with the prefix "R" refer to pages in the Record On Appeal filed with the Appellate Division, Third Department.

imperceptible to the human senses. Electric fields are produced by voltage and exist when a line is connected to a source of electricity, even if electricity is not flowing. Magnetic fields are produced by the flow of electricity. Both types of fields are strongest near their source and rapidly become weaker as one moves away from the source. (R 29-30).

In 1975 the New York Public Service Commission ("PSC") initiated a proceeding to investigate the possible health effects of high voltage transmission lines. In 1978 the PSC adopted an interim electric field standard applicable to transmission lines built after adoption of the standard (R 153-54). The standard was intended to limit the electric field strengths associated with new transmission lines to the average electric field strengths associated with then-existing transmission lines of similar size (R 153-54). The PSC reaffirmed the electric field standard in 1988 (R 155-56), and adopted a similarly derived magnetic field standard in 1990 (R 166-75). Neither standard is health-based, as the PSC concluded, after hearing expert testimony and examining the relevant scientific literature, that there is insufficient scientific evidence to support a conclusion that electric or magnetic fields pose health risks (R 155, R 158, R 170-71).

Under the PSC's standards, 345 kV transmission lines are to be located at least 75 feet from the edges of a right-of-way (R 174). Although the standards do not apply to the subject transmission line (because it predates adoption of the standards), the Record evidence established that the line meets those standards. The certified survey provided by Con Edison in support of its motion for summary judgment established that the transmission line is 115 feet away from the subject property at its closest point (R 24, R 38, R 59). The survey also established that the nearest tower is

approximately 125 feet from the property line and that none of Con Edison's facilities encroach upon or cross over the property (R 38, R 59).

In addition to the *de facto* taking claim, Petitioners' Complaint alleged a cause of action for trespass and sought a permanent injunction (R 40-45).

Con Edison moved for summary judgment dismissing the Complaint in its entirety. Con Edison's motion assumed *arguendo* that EMFs produced by the transmission line had extended onto the subject property (R 18).

In response to the motion, Petitioners withdrew their demand for an injunction, as they had sold the property since commencing the action (R 256). They sold the property for $ 230,000 in October, 1994 (R 191), approximately eighteen months after first placing it on the market (R 248). In an affidavit, Petitioner Howard Reiss stated that Petitioners chose to sell the property because they believed the risks associated with EMFs to be unacceptable (R 188-89). An appraisal submitted by Petitioners concluded that public fear of EMFs had decreased the value of the property by $ 100,000 (R 222). Petitioners, accordingly, reduced the amount of compensation claimed from "no less than $ 425,000" (R 44) to $ 100,000 (R 191, R 222). The appraisal, which valued the subject property as of January 14, 1995 (R 197), did not offer any evidence or opinion that the alleged public fear of EMFs was a permanent condition (see R 195-248).

The New York State Supreme Court, Westchester County, finding neither a trespass nor a taking, granted Con Edison's summary judgment motion (see Pet., Appendix B).

The Appellate Division, Third Department, affirmed the order granting summary judgment.[2] The court concluded that Petitioners had failed to raise a triable issue of fact as to whether the EMFs had physically occupied the property or otherwise interfered with their property rights. *See* 228 A.D.2d at 61-62, 650 N.Y.S.2d at 482. The court held that the evidence that EMFs are imperceptible, coupled with Petitioners' failure to allege or offer proof that EMFs are actually hazardous, established that EMFs are incapable of physically occupying or harming property. *See id.*

Petitioners appealed to the New York Court of Appeals. In their Jurisdictional Statement, they asserted that they were entitled to appeal as of right under New York CPLR § 5601(b)(1) because the action "directly involved the construction of the Constitution of the State of New York and the Constitution of the United States." The Court of Appeals *sua sponte* initiated an examination as to whether an appeal lay as of right on constitutional grounds and invited comments from both Petitioners and Con Edison on that question. Con Edison argued that the Court of Appeals did not have jurisdiction over the appeal as of right because the Appellate Division's decision rested solely on a state common law ground. The Court of Appeals agreed, dismissing the appeal on the ground that "no substantial constitutional question is directly involved." 89 N.Y.2d at 1085, 659 N.Y.S.2d at 858, 681 N.E.2d at 1305 (reproduced at A-1, *infra*). Petitioners subsequently moved for leave to appeal, but the Court of Appeals denied their motion (see Pet., Appendix C).

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[2] The Appellate Division did not address Petitioners' trespass cause of action, as Petitioners abandoned that claim on appeal. *See* 228 A.D.2d at 60 n., 650 N.Y.S.2d at 482 n.1.

Material Misstatements of Fact Contained in the Petition

Comparison of the Statement of the Case contained in this Brief with the Petitioners' Statement of the Case (Pet. 2-4) reveals numerous material factual omissions in the Petitioners' Statement of the Case. In addition, the Petition contains several material misstatements of fact:

1. Petitioners assert that "there is no disagreement that the EMFs invading the property substantially interfered with the Reisses' right to dispose of the property" (Pet. 12).

This statement is inaccurate and misleading in two respects.

First, although Petitioner Howard Reiss claimed to have measured EMF levels "substantially higher than background levels" on the property, Petitioners never offered any quantification of the EMF levels on the property (R 189).

Second, Con Edison has at no time agreed that EMFs interfered at all — let alone substantially — with *any* of Petitioners' property rights. With respect specifically to Petitioners' right to dispose of the property, Con Edison has consistently taken the position that Petitioners' alleged inability to sell the property for a price they believed to be commensurate with its value and their alleged difficulty in finding a purchaser did not constitute a restraint on their right to dispose of the property. Indeed, the fact that Petitioners succeeded in selling the property before Con Edison moved for summary judgment demonstrates that their right to dispose of the property was unimpaired.

2. Petitioners repeatedly assert that the subject property is "one of a discrete and limited number of

properties which are substantially devalued because they immediately abut a massive high voltage electric power transmission line" (Pet. i, see Pet. 15-18).

Those assertions have no evidentiary support in the Record. At no point in this litigation have Petitioners identified a single characteristic that distinguishes them from thousands of other properties adjacent to Con Edison's transmission system.

On the contrary, the proof established that the subject transmission line is 61.4 miles long, with 122.8 miles of property abutting both edges of its right-of-way, and that the subject property extends for approximately 200 feet along the right-of-way (R 59). If it is assumed that each abutting piece of property extends for 200 feet, then there would be 3,242 properties similar to the subject property abutting the right-of-way (5,280 ÷ 200 x 122.8 =3,242). If the owner of each such property were entitled to the $ 100,000 compensation sought by Petitioners, the total compensation payable in connection *with this transmission line alone* would be $ 324.2 million!

In addition, owners of property adjacent to each of the approximately one dozen high voltage transmission lines on Con Edison's system would presumably also be entitled to similar compensation. And, if owners of property adjacent to Con Edison's transmission lines are entitled to compensation, so are owners of property adjacent to all transmission lines in New York State and throughout the United States.

Thus, Petitioners' claim that the impact on the cost of electricity of recognizing their taking claim would be barely perceptible (Pet. 17) is wholly at odds with both the proof and reality.

3. Petitioners refer to "cancerphobia caused by the EMF invasion" (Pet. 17).

However, Petitioners have offered no evidence that EMFs themselves *cause* "cancerphobia" or public fear. Fear may arise out of, or be caused by, what some people say or believe about EMFs, but without proof that EMFs are actually hazardous (which Petitioners have not even alleged), it is patently inaccurate to assert that EMFs cause cancerphobia or public fear.

Taking the analysis one step farther, to imply that Con Edison is responsible for the alleged cancerphobia — and its alleged economic impact on Petitioners — because its transmission of electricity produces EMFs is neither logically nor legally supportable.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS SUBJECT MATTER JURISDICTION, AS THE OPINION AND ORDER SOUGHT TO BE REVIEWED WAS DECIDED ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND

Petitioners' claim is that Con Edison has effected a *de facto* physical taking of their property. Such a claim is insufficient in itself to confer subject matter jurisdiction on this Court. Moreover, because the Opinion and Order sought to be reviewed was decided on a state law ground — *i.e.*, that there has been *no* physical interference with Petitioners' property rights — rather than the construction of the Constitution, the Petition must be denied.

In the decision Petitioners ask this Court to review, the Appellate Division began its analysis by correctly noting that:

> In order to sustain a cause of action for inverse condemnation, plaintiffs must allege and prove that the defendant "has intruded onto the [plaintiffs'] property and interfered with [their] property rights to such a degree that the conduct amounts to a constitutional taking" . . .

228 A.D.2d at 61, 650 N.Y.S.2d at 482 (citation omitted).

The Appellate Division concluded that Petitioners had failed to raise a triable issue of fact as to whether there had been *any* physical interference with their property or property rights, let alone such interference as could rise to the level of a taking. The court reached that conclusion after considering the undisputed proof that EMFs are not perceptible and the fact that Petitioners neither alleged nor sought to prove that EMFs are, in fact, physically harmful or offensive to the human senses.

In effect, the Appellate Division held that an intrusion by an intangible force that neither occupies space nor presents a hazard or physical annoyance that prevents a property owner from occupying, using, or enjoying space does not physically impair any property right.

Petitioners' rather melodramatic protest that the Appellate Division established a "draconian" rule that no taking can occur unless *both* the invasion is perceptible *and* the property owner proves that the perceptible invasion causes a health hazard that makes the property unsafe and uninhabitable (Pet. 9) is, simply, inaccurate. The Appellate

Division did not hold, as Petitioners assert, that a physical invasion must be perceptible to give rise to a taking (Pet. 5); the court merely held that *when* an intrusion is imperceptible, it must be physically harmful or offensive to be actionable. Nothing in the court's decision precludes basing an action on an invasion by imperceptible substances, gases, waves, or forces — such as x-rays, radon, groundwater pollutants, bacteria, and viruses (see Pet. 5-6) — to the extent such are alleged and proven to be harmful or offensive, thereby impairing use and enjoyment of property.

Whether property rights have been interfered with is a question of state law. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-31, 112 S. Ct. 2886, 2900-02, 120 L.Ed.2d 798, 820-23 (1992).

Nothing in the United States Constitution precludes a New York court from determining that causing an intrusion by an intangible, imperceptible, physically innocuous force is not actionable under New York law. Indeed — contrary to Petitioners' assertion that the Appellate Division's decision is unprecedented — that decision reflects the general common law rule, as summarized in the leading treatise on tort law:

> While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant's act must result in an invasion of tangible matter. Otherwise, there would be no use or interference with possession. Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another. These acts may give rise to liability because of a private nuisance resulting from intentional interference with the use and enjoyment of property . . .

Prosser and Keeton, *The Law of Torts* § 13, at 71 (5th ed. 1984) (footnotes omitted).

Here, Petitioners have not alleged that the intangible intrusion interfered with the use and enjoyment of the property. Therefore, their allegations would be insufficient to state claims for either trespass or private nuisance under the common law of a majority of the states.

If the entity charged with causing an intrusion by an intangible, imperceptible, innocuous force were a private party rather than a public utility possessing the power of eminent domain, this Court would unquestionably lack jurisdiction to review the Appellate Division's decision. As a defendant's mere possession of the power of eminent domain cannot transform non-actionable conduct into conduct requiring compensation, it is clear that this Court lacks jurisdiction to review the Appellate Division's decision.

II.

THE APPELLATE DIVISION'S DECISION IS FULLY CONSISTENT WITH PRECEDENT

In addition to being wholly consistent with the general common law rule, the Appellate Division's decision does not conflict in any respect with this Court's construction and application of the Takings Clause. Accordingly, there is no reason for this Court to review that decision.

From the commencement of this action, Petitioners have sought compensation for a *physical* taking. However, they have neither alleged nor sought to prove that the subject property was in any way physically impaired or damaged. What they have sought to prove is that the value of the

subject property was diminished by public fear. Thus, although Petitioners have attempted to cloak their claim in the guise of a physical taking, it is readily apparent that what they actually want is to be compensated for the economic consequences of an alleged public fear without having to prove any nexus between that fear and any actual physical effect on the subject property or its use and enjoyment.

Proceeding from their faulty premise that the Appellate Division's decision requires both perceptibility *and* health or safety risks, Petitioners wrongly analogize this case to cases involving either tangible intrusions *or* intangible intrusions that are harmful or offensive.

For example, Petitioners' heavy reliance on *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S. Ct. 153, 67 L. Ed. 287 (1922), is misplaced. There, this Court held that allegations that the United States had reserved the right to fire heavy artillery over the plaintiff's property were sufficient to state a taking claim. Because it involved the right to cause an intrusion of the property's airspace by tangible objects (cannonballs), *Portsmouth* has no relevance here. That Petitioners find it "puzzling" (Pet. 12) that the Appellate Division did not discuss this inapposite case reflects deficiencies in their analysis, not the Appellate Division's.

In fact, Petitioners have failed to identify a single instance in which this Court has found a *physical* taking unrelated to either the physical occupation of space by tangible matter or the impairment of use and enjoyment by intangible matter. In an attempt to get around this problem, Petitioners contend that the impairment of other "sticks" in their "bundle of property rights" is sufficient to establish their taking claim (Pet. 11). However, even cursory consideration

of the two "sticks" allegedly impaired — "the right to dispose of one's property" and "the right to exclude others"— reveals the infirmity of Petitioners' position.

Petitioners have identified no way in which their right to dispose of the property was impaired. At all times, they retained full legal power to dispose of the property, as evidenced by the fact that they sold the property approximately four months after commencing this action. That market forces may have delayed the sale and resulted in a lower price than they would have liked hardly amounts to a restraint on their right to dispose of the property.

Petitioners' contention that by causing EMFs to enter onto the subject property Con Edison interfered with their right to exclude others assumes too much. The pertinent question is whether Petitioners acquired the right to exclude EMFs from the property when they purchased the property in 1984. *See Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820.

When Petitioners purchased the property, the transmission line had existed in its current form for ten years, and Con Edison had been using the adjacent right-of-way for electric transmission for more than 50 years.. It is reasonable to posit that persons who buy property immediately adjacent to existing transmission lines take such property subject to the physical conditions created by normal operation of those lines. Although it is not reflected in the Appellate Division's decision, much of the questioning on oral argument focused on the fact that Con Edison's operation of the line predated Petitioners' purchase of the property and did not change in any way during the time Petitioners owned the property.

The fact that Petitioners voluntarily purchased the property with full knowledge that a major transmission line was located adjacent to it also belies Petitioners' assertions that they are purely passive victims who have been burdened with costs that users of electricity should properly bear.

Petitioners, moreover, voluntarily subjected themselves to the market forces that they allege to have resulted from Con Edison's operation of the transmission line. Absent allegations or proof that the line is dangerous, they cannot legitimately claim that Con Edison's operation of the line forced them to sell their property at a reduced price at the particular time they chose to sell it. Furthermore, Petitioners offered no proof — via their appraisal or otherwise — that the alleged public fear is permanent.

In short, Petitioners freely chose when to sell the property and are themselves responsible for the economic consequences, if any, of their decision to sell the property. Con Edison has done nothing but operate a transmission line, the location and configuration of which has been found to be consistent with the public interest. Petitioners have neither alleged nor sought to prove that Con Edison did anything to create or encourage the alleged public fear of EMFs. This case is not about Con Edison or its customers unfairly imposing a burden on Petitioners; it is about Petitioners attempting to have Con Edison and its customers bear the economic consequences of Petitioners' voluntary choices and actions.

CONCLUSION

For the reasons discussed in this Brief, the Court should deny the Petition.

Dated: January 13, 1998

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of May 1997

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 484 SSD 21

HOWARD REISS et al.,
Appellants,
v.
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Stuart M. Cohen
Clerk of the Court